

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARTIN FRUTOS, JR.,

Plaintiff,

No. CIV S-04-2361 ALA P

vs.

CALIFORNIA DEPARTMENT
OF CORRECTIONS, et al.,

Defendants.

ORDER

Plaintiff Martin Frutos, Jr., is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Mr. Frutos has filed a complaint alleging violations of his rights under the First and Fourteenth Amendments. He seeks compensatory and punitive damages as well as declaratory and injunctive relief. Defendants have filed a motion to dismiss asserting that they are entitled to qualified immunity. Mr. Frutos has filed an opposition to Defendant's motion to dismiss. For the reasons set forth below, Defendant's motion to dismiss is granted in part and denied in part.

I

On or about November 16, 2001, Barnes & Noble sent Plaintiff a book entitled "Law of Civil RICO," by Douglas Abrams. On November 19, 2001, Plaintiff was informed that he could not receive the book because the book was hardbound. Plaintiff filed an administrative appeal

1 citing his First and Fourteenth Amendment rights and noting that the book was sent by an
2 institutionally approved vendor. Plaintiff was informed that the institution prohibited hardbound
3 books, or the removing of the hard cover, and that his appeal was denied. Plaintiff then filed this
4 action, which Defendants seek to have dismissed.

5 II

6 In considering a motion to dismiss, the court must accept as true the allegations of the
7 complaint in question, *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740 (1976),
8 construe the pleading in the light most favorable to the party opposing the motion and resolve all
9 doubts in the pleader's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, reh'g denied, 396 U.S.
10 869 (1969). Moreover, pro se pleadings are held to a less stringent standard than those drafted
11 by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). A motion to dismiss for failure to state
12 a claim should not be granted unless it appears beyond doubt that Plaintiff can prove no set of
13 facts in support of the claim that would entitle him to relief. *See Hishon v. King & Spalding*, 467
14 U.S. 69, 73 (1984), *citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Palmer v.*
15 *Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1294 (9th Cir. 1981). But, the complaint
16 must contain more than "a formulaic recitation of the elements of a cause of action;" it must
17 contain factual allegations sufficient "to raise a right to relief above the speculative level." *Bell*
18 *Atlantic Corp. v. Twombly*, __ U.S. __, 2007 WL 1461066, slip op. at 8 (2007).

19 III

20 Defendants claim that Plaintiff's complaint should be dismissed because Defendants are
21 entitled to qualified immunity. Government officials performing discretionary functions
22 generally are shielded from liability for civil damages insofar as their conduct does not violate
23 clearly established statutory or constitutional rights of which a reasonable person would have
24 known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether a
25 governmental officer is immune from suit based on the doctrine of qualified immunity, the court
26 must answer two questions. The first is, taken in the light most favorable to the party asserting

1 the injury, do the facts alleged show the officer's conduct violated a constitutional right? *Saucier*
 2 *v. Katz*, 533 U.S. 194, 201 (2001). A negative answer ends the analysis, with qualified immunity
 3 protecting defendant from liability. *Id.* If a constitutional violation occurred, a court must
 4 further inquire “whether the right was clearly established.” *Id.* “If the law did not put the
 5 [defendant] on notice that [his] conduct would be clearly unlawful, summary judgment based on
 6 qualified immunity is appropriate.” *Id.* at 202.

7 Neither the Supreme Court, nor the Ninth Circuit Court of Appeals, have issued a ruling
 8 that directly addresses the issue presented in this case. However, the Supreme Court has upheld
 9 a prison regulation requiring that hardbound books be mailed directly from an approved vendor.
 10 *Bell v. Wolfish* 441 U.S. 530, 550 (1979). Further, it is not disputed that Defendants rejected
 11 Plaintiff’s book pursuant to California Code of Regulations, Title 15, section 3138(f)(1) and
 12 Operational Procedure 12C.11(n) and (o), and (12(N)(8). Thus, even if Plaintiff can show that
 13 the actions of the defendants were unconstitutional, Plaintiff cannot show that such actions
 14 violated a “clearly established” right or that Defendants were on notice that their conduct was
 15 clearly unlawful. Defendants therefore are entitled to qualified immunity.

16 While Defendants are entitled to qualified immunity, “[q]ualified immunity is an
 17 affirmative defense to damage liability; it does not bar actions for declaratory or injunctive
 18 relief.” *American Fire, Theft & Collision Managers, Inc., v. Gillespie*, 932 F.2d 816, 818 (9th
 19 Cir. 1991). Plaintiff may therefore proceed with this complaint in so far as he seeks declaratory
 20 or injunctive relief.

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23 IV

24 Accordingly, IT IS HEREBY ORDERED that:

25 1. Defendant’s motion to dismiss that part of Plaintiff’s complaint seeking
 26 compensatory and punitive damages is GRANTED; and

DATED: November 1, 2007

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